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No. 07-19

In the Supreme Court of the United States

DEPARTMENT OF THE ARMY, PETITIONER

v.

JOHN E. KIRKENDALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 07-19

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REPLY BRIEF FOR THE PETITIONER

The 7-6 en banc majority of the Federal Circuit erred in this case both by concluding that the 15-day statutory time limit for filing an appeal with the Merit Systems Protection Board under the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3300a(d), is not jurisdictional (and therefore not mandatory) and by concluding that the time limit is subject to equitable tolling. With regard to the former conclusion, respondent suggests (Br. in Opp. 21-28) that it is unnecessary for this Court to vacate the court of appeals' judgment and remand in light of the Court's intervening decision in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), on the theory that *Bowles*, which held that a similar appellate time limit was mandatory, does not call into question the court of appeals' analysis. With regard to the latter conclusion, respondent contends (Br. in Opp. 7-21) that, assuming that the time limit is non-jurisdictional, further review is not warranted, because the court of appeals correctly followed decisions from this Court holding that equitable tolling was available under differently

(and less emphatically) worded statutes. Respondent's reasoning is flawed on both counts.

A. The Court of Appeals' Jurisdictional Ruling Cannot Be Squared With *Bowles* v. *Russell*

1. In rejecting the government's argument that the appellate time limit in Section 3330a(d)(1) is jurisdictional (and therefore mandatory), the court of appeals held that statutes specifying periods for review, no less than statutes of limitations, were subject to a presumption in favor of equitable tolling. Pet. App. 19a. The court of appeals asserted that this Court had "clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Id.* at 19a-20a (internal quotation marks omitted) (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004)). In *Bowles*, however, this Court held that the failure to file a notice of appeal within the statutory period deprived a court of appeals of jurisdiction. 127 S. Ct. at 2363-2366. Critically, the Court distinguished all four of the prior decisions on which the court of appeals had relied, explaining that "none of them calls into question our longstanding treatment of statutory time limits for taking an *appeal* as jurisdictional" and that "those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a *statute*." *Id.* at 2364 (emphases added). *Bowles* thus knocks out the underpinnings of the court of appeals' reasoning in holding that the time limit in Section 3330a(d)(1) is not jurisdictional.

Respondent makes no effort to contend otherwise; indeed, he scarcely acknowledges the prior decisions of

this Court on which the court of appeals primarily relied. Instead, he contends that "this case has nothing to do with *Bowles*," Br. in Opp. 21, on the theory that a different rule should apply to time limits for appeals to administrative agencies from that for appeals to Article III courts, *id.* at 1-2, 23-24, 25-26. As a preliminary matter, that contention is best addressed in the first instance by the court of appeals on remand, because that court did not have the benefit of *Bowles* when it issued its decision. Cf. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (providing that a remand is appropriate where there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration").

In any event, respondent's contention lacks merit. Congress can constrain administrative agencies, no less than Article III courts, by specifying the circumstances under which they have jurisdiction to hear cases, including when they act in the capacity of appellate tribunals—and, when Congress does so, agencies have no greater authority than courts to deviate from those constraints. Notably, respondent fails to cite a single decision, from this Court or any other court, that stands for the proposition that appellate time limits for administrative agencies are not "jurisdictional," in the sense of being mandatory. The sole authority respondent cites (Br. in Opp. 25) is a concurring opinion by Judge McConnell, which, far from supporting respondent's position, simply reaffirms the principle that "[t]he scope of regulatory jurisdiction * * * is a matter of policy for Congress to decide," *Fuel Safe Washington* v. *FERC*, 389 F.3d 1313, 1333 (10th Cir. 2004), and concludes that, in the statute at issue, Congress did not permit a party to challenge

the agency's jurisdiction for the first time in a petition for review to an Article III court, see *id.* at 1333-1334.[1]

Respondent more generally relies (Br. in Opp. 15-16, 23-24) on this Court's decisions in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). Both of those cases, however, are distinguishable on the ground that they did not involve deadlines for filing "appeals," but rather deadlines for initiating litigation in Article III courts. See *Irwin*, 498 U.S. at 91 (30-day limit for filing civil action under Title VII after receiving notice of final action by EEOC); *Bowen*, 476 U.S. at 478 (60-day limit for filing civil action under Social Security Act after receiving notice of final decision by Commissioner). Although respondent notes (Br. in Opp. 16) that, at one point in its opinion in *Bowen*, the Court described the statute at issue as providing a mechanism for "seek[ing] judicial review," 476 U.S. at 472, the Court, in rejecting the argument that the 60-day limit was jurisdictional, repeatedly characterized the statute as a statute of "limitations," *id.* at 478-479. Accordingly, neither *Bowen* nor *Irwin* supports respondents' argument that the time limit on appeals at issue here is not jurisdictional. And of course, neither of those cases undermines the rationale of *Bowles*, which compels the contrary conclusion.

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[1] Respondent contends (Br. in Opp. 16) that the time limit at issue in this case is not an "appellate" time limit, because the MSPB does not directly review the underlying decision of the Secretary of Labor. That time limit, however, is "appellate" in the relevant sense, because it governs the transfer of a case from one tribunal to another—*i.e.*, from the Secretary to the MSPB. Notably, the statute establishing the time limit repeatedly characterizes the action before the MSPB as an "appeal." See, *e.g.*, 5 U.S.C. 3330a(d)(1) and (d)(2).

2. Respondent suggests (Br. in Opp. 27) that it would be inappropriate to vacate and remand this case in light of *Bowles* because doing so would delay the hearing that the court of appeals awarded him under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* As a preliminary matter, to the extent that such a remand would result in delay, it is because *respondent* agreed to stay proceedings on his USERRA claim before the MSPB, pending this Court's disposition of the government's petition for a writ of certiorari on his VEOA claim. See 7/27/07 Initial Decision 2. It is therefore unsurprising that, in entering the stay, the administrative judge concluded that respondent would suffer no prejudice from the delay. See *ibid.* More broadly, however, if the Court were to decide not to vacate and remand solely on the ground that it would delay respondent's USERRA hearing, it would effectively penalize the government for failing to seek further review of the court of appeals' holding on whether respondent was entitled to that hearing in the first place. See Pet. 10 n.1.[2]

To the extent that respondent suggests (Br. in Opp. 27) that it would also be inappropriate to vacate and remand because the government could obtain further review of the court of appeals' holding after the underlying VEOA claim is adjudicated, that suggestion also lacks merit. Notwithstanding respondent's contention (Br. in

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[2] While a majority of the en banc court of appeals held that a USERRA complainant is entitled to a hearing as a matter of right, a different majority held that the source of that right was an MSPB regulation (which the MSPB could presumably decide to amend). See Pet. App. 23a-28a (plurality opinion); *id.* at 58a-62a (Moore, J., concurring in the result in relevant part); *id.* at 63a-80a (Bryson, J., dissenting).

Opp. 17-19) that the question presented is neither important nor recurring, the court of appeals' holding is already having deleterious effects in other VEOA cases, and its reasoning calls into question the firmness of other statutory time limits as well. See Pet. 23. Those effects will undoubtedly continue as long as the court of appeals' holding remains in place. This Court should therefore vacate the decision below and afford the court of appeals the opportunity to reconsider, in light of *Bowles*, whether the time limit in Section 3330a(d)(1) is jurisdictional.

B. The Court Of Appeals Further Erred By Allowing Equitable Tolling

1. Having held that the time limit in Section 3330a(d)(1) is not jurisdictional, the court of appeals further erred by concluding that the time limit is subject to equitable tolling. In so doing, the court rejected the government's argument that Section 3330a(d)(1), which provides that a VEOA appeal "in no event may * * * be brought * * * later than 15 days" after the claimant receives written notice from the Secretary of Labor, contains unusually emphatic language that overcomes the ordinarily applicable presumption in favor of equitable tolling. Pet. App. 10a. Further, the court dismissed "the statute's technical language" as "little more than a neutral factor in our analysis." *Ibid.*

In defense of that extraordinary reasoning, respondent contends (Br. in Opp. 11-13) that Section 3330a(d)(1) is no more emphatic than other statutes providing that a claim "must be filed" within a certain period (or that a claim "shall be barred" *unless* it is filed within a certain period), some of which have been held to be subject to equitable tolling. That contention, how-

ever, is mistaken, for the straightforward reason that Congress could have written Section 3330a(d)(1) in those terms. It did not, and instead provided that the deadline in Section 3330a(d)(1) was "in no event" subject to exception. Tellingly, respondent offers no response to the point that a reading of Section 3330a(d)(1) that permitted equitable tolling would render the phrase "in no event" superfluous. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992). Nor does respondent cite a single case in which a court has construed a statute that uses the phrase "in no event" to permit equitable tolling; to the contrary, in other statutes, that phrase has consistently been construed strictly. See Pet. 18-19.

For the same reason, respondent's reliance (Br. in Opp. 9-10) on *United States* v. *Brockamp*, 519 U.S. 347 (1997), is unavailing. The statute in *Brockamp* provided that a "[c]laim for * * * refund * * * of any tax * * * shall be filed by the taxpayer" within a specified time period (and repeated that time limit on several occasions). 26 U.S.C. 6511(a). Notwithstanding that less emphatic statutory language, the Court held that other features of the statute provided a sufficient basis to overcome the presumption in favor of equitable tolling. See *Brockamp*, 519 U.S. at 350-354. Those additional features, however, are not necessary where, as here, the "in no event" language of the statute is itself sufficiently emphatic to overcome the presumption.

Respondent effectively takes the position (Br. in Opp. 14) that, in order to foreclose equitable tolling, Congress must either use "magic words" in the statute (*i.e.*, by expressly providing that "equitable tolling shall not apply"), or include the additional features that the Court cited in *Brockamp*. There is no reason, however, to impose those drafting conditions on Congress. With

regard to Section 3330a(d)(1), respondent notes (Br. in Opp. 10) that the statute is "relatively short"; sets out its time limit in "straight-forward, simple terms"; and states that time limit only once. Respondent does not explain, however, why Congress should be required to repeat a time limit, or to use particularly complex or prolix language, in order to avoid equitable tolling, especially when a simple, emphatic "in no event" would seem to have the same effect. Nor is there any reason to adopt a rule of construction that would encourage Congress to repeat itself (or to speak obscurely and at length).

Respondent further notes (Br. in Opp. 10) that Section 3330a "contains no explicit exceptions that might suggest that Congress deliberately considered, yet rejected, equitable tolling." The obvious inference to be drawn from the fact that Congress specified that a VEOA appeal "in no event may * * * be brought" outside the 15-day limit, however, is that Congress intended that there be *no* exceptions to that limit. Congress need not include *explicit* exceptions simply in order to foreclose the possibility that a broader *implicit* exception would subsequently be read into the statute. Instead, this Court presumes that Congress means what it says in a statute, and here that rule of construction compels the conclusion that Congress meant that the deadline in Section 3330a(d)(1) was "in no event" subject to exception. The court of appeals' contrary conclusion was erroneous, and, in the event that this Court does not vacate and remand for *Bowles*, it should grant plenary review to correct that conclusion.

2. Respondent seemingly acknowledges that, because the Federal Circuit has exclusive jurisdiction over appeals from MSPB decisions in VEOA cases, see

28 U.S.C. 1295(a)(9), no circuit conflict will arise on the availability of equitable tolling under Section 3330a(d)(1). Respondent nevertheless contends (Br. in Opp. 17-19) that further review is unwarranted because the Federal Circuit's decision will have only limited effects on the interpretation of *other* statutes. That contention, however, is belied by the Federal Circuit's extensive reliance in this case on its earlier decision in *Bailey* v. *West*, 160 F.3d 1360 (1998), in which a divided en banc court, using similar methodology, held that the time limit for filing appeals from the Board of Veterans' Appeals to the Court of Veterans Appeals is subject to equitable tolling. *Id.* at 1368. This Court's intervention is warranted not only to correct the Federal Circuit's erroneous decision in this case, but to ensure that the Federal Circuit will not continue to employ that unduly broad methodology in future cases concerning the availability of equitable tolling.

Finally, respondent contends (Br. in Opp. 20) that this case would constitute a poor vehicle for resolving the question presented because the government did not seek review on the "closely related" question whether the 60-day time limit for filing a VEOA *complaint* (with the Secretary of Labor) is also subject to equitable tolling. The time limit for filing a VEOA complaint, however, is worded in less emphatic terms than the time limit for filing a VEOA appeal. See 5 U.S.C. 3330a(a)(2)(A) (providing that a VEOA complaint "must be filed within 60 days after the date of the alleged violation"). Respondent hints, but stops short of affirmatively arguing (Br. in Opp. 20), that the VEOA time limits are "jurisdictional" for purposes of the rule that an Article III court must consider questions of *its own* jurisdiction at the threshold. See *Steel Co.* v. *Citizens for*

a Better Env't, 523 U.S. 83, 95 (1998). Even if that were true, however, there is no reason that this Court would have to consider the question whether equitable tolling is available for the filing of a VEOA complaint *before* the question whether it is available for the filing of a VEOA appeal. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (explaining that, "[w]hile * * * subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues"). It is thus unnecessary for this Court to consider both questions in one case. And no such issue would arise if the Court were simply to vacate and remand in light of its intervening decision in *Bowles*.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). In the alternative, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted.

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